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# FEDERAL TAXATION OF INTERSTATE COMMERCE.

THE policy of Congress for the greater part of the life of the United States under their present Constitution has been to promote free trade between all parts of the United States. This has been mainly accomplished by refraining from legislation to regulate interstate commerce. Of late years it has been urged in high quarters that statutes should be enacted to bring under federal supervision the larger corporations, having a franchise from a state, which dispose of goods through such commerce. One mode suggested for accomplishing this result has been the requirement of a federal license. It is the purpose of this paper to suggest another, as not legally impossible, — taxation.

Congress has power to lay taxes, duties, imposts, and excises. The word "impost," as thus used, has been said by the Supreme Court of the United States not to cover imposts on importations from one state into another.[1] In the same opinion it was held that the clause[2] as to state laws for imposts or duties on imports and exports had no reference to interstate commerce. But should Congress lay such duties on exports from one state to another, would it necessarily be obnoxious to the provision in restriction of its powers that "no tax or duty shall be laid on articles exported from any state"?

A statute of such a character would most naturally take the shape of a tax on the business of shipping goods from one state to another for a market, when conducted by an artificial person of a certain character and attaining large proportions. It might, for instance, affect only private corporations so shipping goods of a value of $1,000,000 a year, and having a capital stock of not less than $5,000,000.

If Congress should be of opinion that artificial bodies of this kind, dealing in large values, and permitted to enjoy the privileges of a market as wide as the United States, with all the transportation facilities provided or kept in order under the national power to regulate commerce among the several states, were proper sources

[1] Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 132.

[2] Art. I. § 9.

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from which to draw a revenue, is there anything in the Constitution of the United States to prevent legislation to that end? No doubt, such a tax on the shipper, for the privilege of shipment and sale, would in effect be a tax on exports from a state.[1] But if the reasoning in Woodruff *v.* Parham be sound, is there anything in the Constitution which in terms forbids a tax on exports from a state to another state, whether imposed by Congress or by a state?

The importance of this question seems to justify an examination of the grounds of the opinion in that famous case.

It contains an historical review of the use of the terms "exports" and "imports" prior to the adoption of the Constitution, concluding thus:[2]

"It is not too much to say that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. . . . Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one state to tax articles brought into it from another."

Mr. Justice Nelson filed a vigorous dissenting opinion. The power of Congress to regulate commerce, he observed,[3] extends both to that with foreign nations and between the states. "The two are placed upon the same footing without any discrimination. The power is equally broad and absolute over the one as over the other. No distinction is made between foreign and interstate commerce; and why should the specific prohibitions to be found in the Constitution in relation to this subject receive a different interpretation, in the absence of any words indicating any such distinction? Take, as an example, the prohibition upon the federal government: 'No tax or duty shall be laid on articles exported from any state.' Is this clause, also, to receive the narrow and strained construction given to the one in question, and be applied only to exports to a foreign country? If so, then Congress may tax all exports from one state to another. If the terms in the clause before us do not

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[1] Brown *v* Maryland, 12 Wheat. (U. S.) 419.
[2] 8 Wall. (U. S.) 136.
[3] *Ibid.* 144.

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embrace interstate commerce, then the above clause does not. As was said by the Chief Justice in Brown *v.* Maryland, 'There is some diversity in the language, but none is perceivable in the act which is prohibited.' Now, this is a prohibition or limitation upon the general commercial power conferred upon Congress, but if it only applies to foreign commerce, it loses more than half its efficiency as heretofore supposed to belong to it."

Similar views as to these points have been since expressed by other members of the Supreme Court of the United States, in dissenting opinions,[1] but the doctrine of Woodruff *v.* Parham as to taxes by a state on exports and imports has notwithstanding been repeatedly reaffirmed.[2]

It is submitted that the historical basis on which it rests is insecure.

There can be no doubt that one of the immediate causes of the adoption of the national Constitution was the varying, conflicting, and discriminating legislation of the different states on the subject of trade not wholly domestic. It was the effect of this on the commerce of the Chesapeake which led to the Annapolis Convention, and that Convention led to the greater one at Philadelphia.[3]

Virginia, as early as October, 1782, had laid a duty on all ardent spirits, "which shall be imported or brought into this Commonwealth, either by land or water, from any port or place whatsoever."[4] In the following May she took similar action as to all goods of certain kinds "which may be imported either by land or water into this state."[5] There could, of course, be no importation by land, from a foreign country, for Virginia had no foreign neighbor.

Massachusetts, on March 22, 1783, provided for an "impost" to be paid "at the Time and Place of Importation" on all goods "of European and India Growth and manufacture — (on which no Duty or Excise is laid by any Act of this Commonwealth now in force), that shall be imported by land or water from any foreign Port, Island, or Plantation, or any other State whatever, into this State, and landed within the same."[6]

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[1] The Lottery Case, 188 U. S. 321, 373.
[2] Am. Steel & Wire Co. *v.* Speed, 192 U. S. 500.
[3] See Cook *v.* Pennsylvania, 97 U. S. 566, 574.
[4] 11 Hennings Laws 121.
[5] *Ibid.* 196.
[6] Session Laws of 1783, State Reprint, 152.

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A few months later (July 10, 1783), this was superseded by another and much more comprehensive act.[1]

This laid "an impost" on all goods "that shall be brought into this Commonwealth by land or water (except hemp and salt and such articles as are the manufacture and growth of the United States of America) that shall be landed or unloaded within the same."

An exception was made in favor of "Rum manufactured within this Commonwealth," sold "to be exported by land into a neighboring State."[2]

The act was to be in force for three years only.

The next year this exception was repealed, but with a proviso in favor of goods imported "belonging to a subject of any other State in the Union, and designed to be exported whole and entire to such State by water only," but "no subject of any other State in the Union" was to be "entitled to the benefit of the foregoing provision, unless there be an Act laying duties of impost of equal amount within such State; nor until the legislature of such State shall have passed a law, equally beneficial to the subjects of this Commonwealth."[3]

The comparative ease of the burden which is laid on the people in general by taxes on imports was as well understood then as now. Each state was also bidding for foreign trade. There was legislation by Connecticut in the direction of exempting foreign imports from duties, while imposing them on those from other states. One of these statutes, entitled "An Act for Levying and collecting a Duty on certain Articles of Goods, Wares and Merchandize imported into this State, by Land or Water," concerned only goods "imported or brought into this State, by Land or Water, from any of the United States of America."[4] This legislation bore hardly on Massachusetts, and the General Court of that state soon afterwards (on June 27, 1785) passed a Resolution entitled as "Requesting the Governor to procure the laws of other States, to publish an abstract of customs and duties, and to expostulate with other States respecting their Excise Acts," which contained the following provision:

"And it is further Resolved, That his Excellency be requested to expostulate with such of the United States, as have passed Impost and Excise

[1] Session Laws of 1783, State Reprint, 506. [2] *Ibid.* 519.
[3] Session Laws of 1784, State Reprint, 29.
[4] Session Laws of May, 1784, 268, 270; and of October, 1784, 312.

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Acts, or other Laws for the Regulation of Trade, that affect the commercial interest of the citizens of this State, and to urge the propriety of their making such alterations and amendments, as shall render them not only conformable to the spirit of the Constitution, but consistent with those principles of reciprocity which in a national view, ought ever to be adopted."

Governor Bowdoin accordingly wrote to the Governor of Connecticut, on July 27, 1785, a letter commencing thus:

"I have observed a law passed by the Legislature of Connecticut, whereby a duty is laid on goods imported into that State from any of the United States, while the same goods are exempted from a duty if imported into that State from a foreign country. This distinction, so manifestly giving a preference to foreigners in prejudice to the United States, it is to be feared, may be construed as indicating an abatement of that mutual affection and good humour which subsisted among them in the time of their calamity & distress; which was indispensibly necessary while they were jointly struggling against common injury, and which will be equally necessary while they continue, as they at present are, embarked in the same common interest and exposed to common danger. . . .

"But the Act above referd to not only injures in its operation the foreign commerce of this Commonwealth, but prevents its citizens from vending articles of their own manufacture to the citizens of Connecticut. This must be considered as the more exceptionable, inasmuch as for the sake of cementing the Union which is the true policy of the confederated Commonwealth, our laws exact no duties on the manufactures of any of the United States, and in regard to commerce their citizens respectively stand upon a footing with our own."[1]

A copy of this communication and also of the legislative resolution was sent by Governor Bowdoin to every other state of the United States. The object of this action he explained more fully to Patrick Henry as Governor of Virginia in an official letter of October 18, 1785, of which the following is a part:

"One of the States had passed an Act laying duties on foreign goods imported from any of the United States, while the same goods imported immediately from foreign countries were not chargeable with such duties. By the same Act duties were also laid on rum, loaf sugar, and several other articles which are manufactured in this Commonwealth. A preference thus given to foreigners to the prejudice of the United States, or either of them, appeared very extraordinary. This Commonwealth felt itself affected, both as a member of the Confederacy and as an individual State charged with duties

[1] 6 Collections of the Mass. Hist. Soc., 7th Series, 62.

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on its own manufactures, whereby its citizens would probably be prevented from vending them to the citizens of a sister State. The measure appeard the more grievous, because the laws of this Commonwealth require no duties on the manufactures of any of the United States, and their citizens respectively are in point of commerce on a footing here with our own. The Act aforementioned gave rise to the Resolution. Your Excy. will perceive it must particularly apply to that State. Accordingly an expostulatory letter was addressed to that State only. But as it must, in the opinion of every one, be a matter of the utmost importance to the United States that each of them should carefully avoid taking measures which might give just cause of offence to others & tend to the interruption of that harmony & mutual good will upon which the general safety & wellfare depends, I took the liberty to inclose it to the several States; being fully perswaded that if any of them should think proper to revise their commercial laws, and should thereupon observe an instance of such a nature & tendency, it would be alterd or repeald."[1]

Undoubtedly this correspondence was before the Virginia Assembly when, in November, 1785, they voted to instruct their delegates in Congress to propose a recommendation to the states that they should authorize Congress to regulate their trade on certain principles, one of which was thus stated:

"That no State be at liberty to impose duties on any goods, wares or merchandise, imported, by land or by water, from any other State, but may altogether prohibit the importation from any State of any particular species or description of goods, wares or merchandise, of which the importation is at the same time prohibited from all other places whatsoever."[2]

On reconsideration, this vote gave place to the resolution under which (Jan. 21, 1786) the Annapolis Convention was called.[3]

It may be added that Massachusetts, pending the result of her Governor's expostulations, suspended, from time to time, the proviso of her impost statute above quoted in favor of subjects of other states of the United States.[4]

The last of these suspending resolutions (which were passed on July 4 and Dec. 1, 1785, and Feb. 28 and July 8, 1786), "in order to induce a free trade with the interior parts of our neighboring States," allowed an exemption from excise of all articles "transported out of the State by land" in bond.

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1 6 Collections of the Mass. Hist. Soc., 7th Series, 76.

2 1 Elliot's Debates 114.

3 *Ibid.* 115.

4 Session Laws of 1785, State Reprint, 656, 698, 809, 859; *ibid.* of 1786, 67.

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In 1786 (Nov. 18) all these acts were repealed by a new law, in which, among other things, boots and shoes, artificial flowers, playing cards, perfumery, children's toys, spelling books, novels, romances, and plays, coffin furniture, candles, butter, and all kinds of wearing apparel, "not being the growth or manufacture of any of the United States of America," were "declared to be contraband, and are prohibited from being brought into this State by land or water, on pain of forfeiture." Goods imported "belonging to a Citizen of any other State in the Union" and "transported whole and entire to such State" were exempted from any duty.[1]

On March 14, 1788, an act was passed reciting that many bonds had been given "to secure the import of goods imported into this Commonwealth" by citizens of other states, which "were afterwards exported to those States where the owners lived," and ordering the cancellation of their obligations, on satisfactory proof that such goods were in fact "Exported out of this Commonwealth and not relanded therein."[2]

In the same month and year, Maryland, to protect the people and markets of the town of Baltimore, provided for the inspection of all salted beef or fish "brought or imported into the said town from any part of this State or any one of the United States, or from any foreign port whatever." The importer was to pay the inspection fee, and the professed object was to make it secure that the beef or fish was merchantable and sound.[3]

It is difficult to read statutes like those above described, and particularly such parts of them as have been quoted, without coming to the opinion that the terms "exports" and "imports" were deemed by the legislators of the day, if not otherwise qualified,[4] as covering exports from and imports into the states of the Union, whether the trade were between the states or with foreign parts.

In the discussions in the Federal Convention of 1787, on the proposition that Congress should be forbidden to tax articles exported from any state, Mr. Langdon of New Hampshire observed that this left the states at liberty to tax exports, and that "New Hampshire therefore, with the other non-exporting States, will be subject to be taxed by the States exporting its produce."[5]

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[1] Session Laws, State Reprint, 117.

[2] Session Laws of 1787, State Reprint, 839.

[3] 2 Laws of Maryland, 1811 Ed., Maxcy's Revision, 4.

[4] As was done in the Act of Congress of April 18, 1783. 8 Journal of Congress 186.

[5] 5 Elliot's Debates 454.



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Ellsworth replied that the power of Congress to regulate trade between the states would protect them against each other, but, if not, the attempts of one to tax the produce of another passing through its hands would "force a direct exportation and defeat themselves." Madison insisted that a grant to Congress of power to tax exports was necessary, because its power to regulate "trade between State and State cannot effect more than indirectly to hinder a State from taxing its own exports." This hindrance Congress could create by authorizing the citizens of any state "to carry their commodities freely into a neighboring State, which might decline taxing exports, in order to draw into its channel the trade of its neighbors. As to the fear of disproportionate burdens on the more exporting States, it might be remarked that it was agreed, on all hands, that the revenue would principally be drawn from trade, and as only a given revenue would be needed, it was not material whether all should be drawn wholly from imports, or half from those and half from exports. The imports and exports must be pretty nearly equal in every State, and, relatively, the same among the different States."[1]

Later, when Mason argued that the states ought not to be prohibited in all cases from laying "imposts or duties on imports," since they might need to do so in order to encourage certain manufactures for which they had natural advantages, Madison replied that "the encouragement of manufactures in that mode requires duties, not only on imports directly from foreign countries, but from the other States in the Union, which would revive all the mischiefs experienced from the want of a general government over commerce."[2]

It must not be forgotten that at this era the several states were, in abstract theory, complete and independent sovereigns. Each was foreign to every other in everything, notwithstanding the political alliance between them. From the earliest colonial times the commercial policy of each had been self-centered. Connecticut, before 1650, had taxed the produce of Massachusetts on its way down the Connecticut river to the ocean, and Massachusetts, in retaliation, had taxed all exports from Massachusetts Bay or imports into Boston harbor of goods owned by citizens of the other New England colonies.[3] Early in the next century New York (in 1734)

[1] 5 Elliot's Debates 455.

[2] *Ibid.* 486.

[3] The Secession of Springfield from Connecticut, 2 Publications of the Colonial Society of Massachusetts 55.

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passed an act laying a tonnage duty on all vessels built or owned in any other of the colonies.[1] Many other instances of similar trade legislation having intercolonial or interstate effect have been collected by a recent writer of merit; and it is believed that his assertion that the doctrine of Woodruff *v.* Parham has not been generally approved by the bar is well warranted.[2]

A grave point of constitutional construction is never settled beyond further question by judicial decisions. A court can reverse itself, and in such a matter ought to reverse itself, if satisfied that a wrong result has been reached.[3] But assuming either that the rule laid down in Woodruff *v.* Parham was correct, or that, if incorrect, it will not be reconsidered, what answer is there to Mr. Justice Nelson's assertion that on this construction of the Constitution Congress is only forbidden to tax exports to foreign countries, and therefore can tax all exports from one state to another?

The Supreme Court said in the income tax cases that nothing could be clearer than that what the Constitution intended to guard against, by its provisions respecting direct taxation, "was the exercise by the general government of the power of directly taxing persons and property within any State, through a majority made up from the other States."[4] But by the same judgment Hylton *v.* United States[5] was justified[6] on the ground that the carriage tax there in question was simply an excise on the use of a carriage, and therefore indirect.

In like manner, a tax on large shipping corporations for the enjoyment of the privilege of shipping from state to state would seem to be an excise on the use of that privilege, and so to impose it to be within the power of Congress, unless withdrawn from it by some prohibition. But where is there any prohibition, unless that against its taxing exports from any state?

It could be strongly argued that the power to regulate commerce between the states would not support such a tax. To regulate the mode of trade in the interest of trade is one thing; to hinder its freedom by taxation for revenue is quite another. The Supreme Court of the United States has intimated that it might

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[1] 6 Documents relating to the Colonial History of N. Y. 38.

[2] Prentice, The Federal Power over Carriers and Corporations, 38–48.

[3] The Genessee Chief, 12 How. (U. S.) 443, 455.

[4] Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, 582.

[5] 3 Dall. (U. S.) 171.

[6] P. 579.

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be difficult to vindicate, as a regulation by Congress of interstate commerce, a provision that goods brought into one state from another should be for a certain prescribed period exempt from taxation in the former state.[1] It would certainly be much more difficult to vindicate, as such, a regulation by a statute by which such goods were, directly or indirectly, made taxable by the United States.

But the taxing power can fasten upon any business, and if a law is ostensibly to lay a tax for producing revenue, it can hardly be assailed as really intended to achieve a different object. Nor, were the tax so high as necessarily to drive the corporations affected by it out of their interstate business, could this be any objection to its validity.[2]

Mr. Prentice argues, in his work above cited,[3] that to engage in interstate commerce is an inherent right of every American; that the Fifth Amendment forbids its denial by the United States either to natural or artificial persons; and that a corporate franchise to engage in interstate commerce, derived from a state, is beyond federal control. These positions in regard to artificial persons, to say the least, seem questionable. A corporate franchise carries no inherent authority with it, except as against the sovereign from which it came, his subjects, causes heard within his territory, or acts done or to be done there. A corporation is not a citizen of the United States, nor of a state, within the meaning of the constitutional guaranties.[4]

But whether it have the right or not, as against the United States, to engage in commerce between states, cannot affect the power of the United States to tax the exercise of what is claimed to be such a right,[5] even if carried to such a point that the tax operates to exclude. Nor are there provisions in the national Constitution like those in many of the states, that in matters of taxation all must be treated alike. It is enough if the tax, being indirect, is uniform; and uniformity means only uniformity of geographical application.[6]

There is an *obiter dictum* of the Supreme Court of the United States which relates to the subject of this paper, and is as follows:

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[1] Brown *v.* Houston, 114 U. S. 622, 634; *cf.* Adair *v.* U. S., 208 U. S. 161, 178.
[2] Fairbank *v.* United States, 181 U. S. 283, 290.
[3] Pp. 33–37.
[4] Paul *v.* Virginia, 8 Wall. (U. S.) 168.
[5] Nicol *v.* Ames, 173 U. S. 509, 515.
[6] Knowlton *v.* Moore, 178 U. S. 41, 106.

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"It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the first paragraph of Art. 1, sec. 8, that 'all duties, imposts and excises shall be uniform throughout the United States.' There is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the States, which is merely incidental to its right to regulate interstate commerce. The question, however, is not involved in this case, and we do not desire to express an opinion upon it."[1]

But would the difficulty thus suggested be felt if the tax took the shape which has been already indicated?

It would operate only indirectly on exports from a state. It would operate uniformly in every part of the United States, affecting everywhere precisely the same class of corporations and each member of the class in precisely the same way.

As to the expediency of such legislation, it is not intended here to express an opinion.

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[1] Dooley *v.* U. S., 183 U. S. 151, 157.

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